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MAR 15 2011

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
MODESTO DIVISION

In re) Case No. 10-91936-E-7
WALTER RALPH PINEDA,)
Debtor(s).)

WALTER RALPH PINEDA,) Adv. Pro. No. 10-9060
Plaintiff(s),) Docket Control No. WRP-5
v.)
BANK OF AMERICA, N.A., et al,) DATE: March 23, 2011
Defendant(s).) TIME: 10:30 a.m.
DEPT: E

)

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM FOR ISSUANCE OF TEMPORARY RESTRAINING ORDER

The court has been presented with a Motion for Injunctive Relief and Ex Parte Application for a Temporary Restraining Order filed by Walter R. Pineda, a pro se plaintiff in this adversary proceeding. The Motion was presented the court at 4:00 p.m. on March 14, 2011. In the Motion Mr. Pineda asserts that Bank of America Corp, LP, a defendant, intends to conduct a non-judicial foreclosure sale at 3:00 p.m. on March 15, 2011, for real property

STANDARD FORM

1 commonly known as 22550 Bennett Road, Sonora, California ("Bennett
2 Road Property"). The Bennet Road Property is listed on Schedule A
3 as real property owned by the Debtor and his unnamed spouse, with
4 a value of \$210,000.00 Schedule A, Docket Entry No. 16, Case No.
5 10-91936.

6 The Debtor commenced a voluntary Chapter 7 case on May 20,
7 2010. The petition lists the Bennett Road Property as his street
8 address. The nature of the Debtor's business is listed as "Law."
9 The petition further states that the Debtor has not filed any prior
10 bankruptcy cases within the last 8 years. Petition, Docket Entry
11 No. 1, Case No. 10-91936.

12 On Schedule D filed by the Debtor on June 14, 2010, the Debtor
13 lists the Bank of New York Mellon as his only creditor having a
14 secured claim. He states under penalty of perjury that there is a
15 codebtor, that the date the claim was incurred, nature of the lien,
16 and description of collateral is "Unknown," the value of the
17 unknown collateral is \$10.00, and the amount of the claim is
18 \$10.00. Docket Entry No. 18. In the original Schedule D filed on
19 June 3, 2010, the Debtor stated under penalty of perjury that Bank
20 of America had a claim for a debt incurred on August 13, 2002,
21 secured by a deed of trust against the Bennett Road Property, that
22 the Bennett Road Property had a value of \$300,000.00, and that the
23 Bank's disputed claim was for \$477,894.27. Nothing in the court's
24 file indicates which statement under penalty of perjury is true and
25 correct.

26 The Motion asserts that by proceeding with a trustee's sale
27 under the deed of trust, Bank of America Corp., LP is attempting to
28 usurp the court's authority with respect to this adversary

1 proceeding, and is in violation of Rule 7001, Federal Rules of
2 Civil Procedure (which states the matters for which an adversary
3 proceeding is required), and Rule 65, Federal Rules of Civil
4 Procedure, and Rule 7065, Federal Rules of Bankruptcy Procedure,
5 (injunctive relief). The Motion does not assert how a non-judicial
6 foreclosure sale usurps the court's power relating to adversary
7 proceedings and injunctive relief. The court construes this
8 contention to be that if the foreclosure sale is allowed to
9 proceed, the court will be unable to grant the relief requested by
10 the Debtor in the Complaint.

11 The Debtor next contends that he will suffer immediate,
12 irreparable injury, loss or damage in that Plaintiff/Debtor's
13 "current poor, physical condition will worsen and Plaintiff will
14 become homeless balanced against adding another vacant home to
15 Defendant's hundreds of thousands of vacant homes inventory."
16 Motion, pg. 2:17-20. The Debtor/Plaintiff further alleges that a
17 non-judicial foreclosure will impair the administration of the
18 Chapter 7 case, but does not identify the potential impairment.

19 The Debtor has filed a document titled affidavit in support of
20 the Motion in which he states that he is currently under treatment
21 for a deteriorating transplanted liver and will become homeless in
22 the event of a sale. Further, that failure to grant the
23 restraining order will result in the Debtor/Plaintiff being denied
24 the protection of the injunctive relief rules, as well as
25 frustrating (in an unstated way) the administration of the
26 Chapter 7 case. The "Affidavit" further states that he called the
27 law office for Bank of America's attorneys and advised them that he
28 was seeking a temporary restraining order. Though this document is

1 not in the proper form or notarized as an affidavit and does not
2 state that it is under penalty of perjury so as to be a
3 declaration, the court takes into account that the Debtor is
4 representing himself in *pro se*, and for purposes of this *ex parte*
5 Motion will consider the statements as being made under penalty of
6 perjury.

7 On January 25, 2010, Bank of America, N.A., as the alleged
8 beneficiary under the deed of trust, instructed ReconTrust Company,
9 N.A. to file a notice of default. The deed of trust, Exhibit 4,
10 names PRLAP, Inc. as the trustee and not ReconTrust Company, N.A.
11 On February 9, 2010, Bank of America an assignment of trust deed
12 and a substitution of trustee, naming ReconTrust Company as the
13 trustee. It is alleged that this assignment was for the purpose of
14 misrepresenting who is the owner of the note and deed of trust.
15 Debtor/Plaintiff further contends that Bank of America, N.A. and
16 ReconTrust Company improperly commenced the nonjudicial foreclosure
17 in violation of California Civil Code Sections 2924a et. seq.

18 Debtor/Plaintiff further alleges that on May 2, 2010, he was
19 notified that a nonjudicial foreclosure sale would be conducted at
20 3:30 p.m. pursuant to the deed of trust. It is contended that such
21 sale was improper because Bank of America and ReconTrust Company
22 did not have the authority to conduct a nonjudicial foreclosure
23 sale.

24 **Summary of Complaint**

25 The court has reviewed the First Amended Complaint filed in
26 this Adversary Proceeding, Docket Entry No. 57. The
27 Debtor/Plaintiff first asserts a series of claims against Bank of
28 America, N.A. and other Defendants arising under the Real Estate

1 Settlement Procedures Act (RESPA, 12 U.S.C. 2601 et seq.), Truth in
2 Lending Act (15 U.S.C. § 1600 et. seq.), Fraud (California Civil
3 Code § 1709), California Unfair Business Practices Act (California
4 Civil Code § 17200 et seq.), and breach of contract. The gist of
5 the complaint is that various improper conduct has existed with
6 respect to loan foreclosures throughout the country. This is
7 commonly referred to as the Robo-Signing investigations. It is
8 alleged that the Defendants have refused to provide the
9 Debtor/Plaintiff with an accounting as required under 12 U.S.C.
10 § 2605(a)(1)(A), (f), which has caused Debtor/Plaintiff unstated
11 pecuniary damages. Much of this part of the complaint appears to
12 focus on default swaps, obtaining funds from investors, credit
13 obtained by Defendants, securitized loan pools into which the note
14 was transferred. These allegations do not go to the question of
15 whether the Debtor/Plaintiff has defaulted on his particular loan.
16 At no point in the Complaint or present motion does the
17 Debtor/Plaintiff assert that he is current on the obligations
18 secured by the Deed of Trust. Rather, the contention appears to be
19 that based upon the post-loan financial transactions of the
20 Defendants, monies they received from third-parties from the sale
21 and brokering of the note should be treated as payments on the
22 Note.

23 It is also asserted that neither Bank of America, N.A. or
24 ReconTrust Company are authorized as agents of the Bank of New York
25 Mellon, the alleged trustee of the trust in which the
26 Debtor/Plaintiff's note has been transferred to initiate the
27 nonjudicial foreclosure process. It is further contended that the
28 nonjudicial foreclosure process is an attempt to swindle the

1 property from the Debtor/Plaintiff. Through this second cause of
2 action the Debtor/Plaintiff seeks a determination of the rights of
3 the respective parties.

4 In reviewing the exhibits filed with the original complaint,
5 there is a May 7, 2010 letter from Bank of America, to the
6 Debtor/Plaintiff stating that it was servicing the loan for the
7 Bank of New York, the investor. The letter does not explain what
8 is meant by referencing the Bank of New York as an investor.
9 However, the letter does clearly state that Bank of America is the
10 entity servicing the loan, though that position is not explained in
11 the letter. Finally, this letter unequivocally states that "Bank
12 of America did not sell your loan at anytime."

13 The Debtor/Plaintiff has attached as Exhibit 2 an April 6,
14 2010 letter from Bank of America to the Debtor/Plaintiff which
15 states that a copy of the complete loan history is attached. (The
16 Debtor/Plaintiff did not include the loan history as part of the
17 exhibit.) This letter states that "The Bank of New York Mellon,
18 fka The Bank of New York, as trustee for the certificate holders of
19 GSR 2003-9..." is the owner of the Note. This appears to conflict
20 with the May 7, 2010 letter stating to the Debtor/Plaintiff that
21 the note has never been sold. Additionally, the letter identifies
22 the Bank of New York Mellon as the trustee for the "certificate
23 holders" of the trust, and not as a trustee of the trust itself.

24 The Debtor/Plaintiff also contends that the Substitution of
25 Trustee and Assignment of Deed of Trust recorded by Bank of America
26 on February 9, 2010, Exhibit 8 is false as there is no basis for
27 showing that it had the authority to do so at that time. The
28 document purports to assign all beneficial interest in the deed of

1 trust from Bank of America, N.A. to Bank of America, N.A., as
2 servicer for GSR Mortgage Loan Trust 2003-9. This purported
3 assignment was made three months prior to the May 7, 2010 letter in
4 which Bank of America advised the Debtor/Plaintiff that Bank of
5 America never sold the loan at any time.

6 The Debtor/Plaintiff has attached as Exhibit 10 the notice of
7 default issued with respect to the Note and Deed of Trust. This
8 notice was recorded on January 25, 2010 and states that ReconTrust
9 Company is acting as the agent for the beneficiary under the Deed
10 of Trust. At this juncture, based upon the allegations in the
11 complaint, Bank of New York Mellon was the owner of the Note, as
12 the trustee of the GSR Mortgage Loan Trust 2003-9 (the court is
13 presuming that the reference by Bank of America to Bank of New York
14 Mellon being the trustee for the certificate holders actually means
15 the trustee of the trust for which the beneficiaries are
16 certificate holders). The purported assignment of the Deed of
17 Trust to Bank of America, as servicer did not occur until February
18 2010, after the notice of default was issued and recorded.

19 From the court's survey of California law, an assignment of
20 the note carries the mortgage with it, while an assignment of the
21 mortgage alone is a nullity. *Carpenter v. Longan*, 83 U.S. 271, 274
22 (1872); *accord Henley v. Hotaling*, 41 Cal. 22, 28 (1871); *Seidell*
23 v. *Tuxedo Land Co.*, 216 Cal. 165, 170 (1932). If one party
24 receives the note and another receives the deed of trust, the
25 holder of the note prevails regardless of the order in which the
26 interests were transferred. *Adler v. Sargent*, 109 Cal. 42, 49-50
27 (1895). "Where a power to sell real property is given to a
28 mortgagee, or other encumbrancer, in an instrument intended to

1 secure the payment of money, the power is part of the security and
2 vests in any person by assignment becomes entitled to payment of
3 the money secured by the instrument. The power of sale may be
4 exercised by the assignee if the assignment is duly acknowledged
5 and recorded." California Civil Code § 2932.5.

6 The Debtor/Plaintiff also alleges that the Defendants have
7 breached their contractual obligations arising under the Note and
8 Deed of Trust. The alleged breaches include instructing ReconTrust
9 to file the notice of default; failure to advise the
10 Debtor/Plaintiff of the transfer of the Note; failing to account
11 for the monies received in the transfers, securitization, and
12 credit default swaps; and using the note in the GSR Trust.
13 Debtor/Plaintiff asserts that his damages include the drop in real
14 estate values due to the Defendants "reckless, irresponsible, and
15 greedy conduct" in the home mortgage market in the 2000's.

16 In light of the Debtor/Plaintiff's *pro se* status, it also
17 appears that the Complaint seeks to enjoin the Defendants from
18 proceeding with a non-judicial foreclosure sale pending a
19 determination of who owns the note and who is the beneficiary of
20 under the Deed of Trust.

21 **STATUS OF ADVERSARY PROCEEDING**

22 The Adversary Proceeding was filed August 20, 2010. No answer
23 has been filed, with the Defendants having filed several motions
24 attacking the complaint. These have been denied without prejudice.
25 On January 28, 2011 the Debtor/Plaintiff, Bank of America, N.A.,
26 ReconTrust Company, N.A., Bank of New York Mellon, N.A., Inc., and
27 Goldman Sachs, Inc. (GSR Mortgage Loan Trust 2003-9) filed a
28 stipulation extending the deadline for Debtor/Plaintiff to file a

1 first amended complaint. The First Amended Complaint was filed on
2 February 4, 2011, and the Defendants have filed a Motion to Dismiss
3 which is set for hearing on April 6, 2011. It appears that the
4 Motion to Dismiss directly attacks the issues raised in the
5 Complaint and are inexorably tied to the issuance of injunctive
6 relief in this case.

7 **RULING**

8 Though the Debtor/Plaintiff appears to have staked his case on
9 contentions and allegations which have nothing to do with his
10 performance on the Note - making the payments promised for the
11 monies borrowed, he does raise a credible issue as to who owns the
12 note, and under California law, who is the beneficiary entitled to
13 enforce the Note. At this early juncture, it appears that by the
14 time Bank of America sought to "assign" the beneficial interest to
15 itself as servicer, the Note had been transferred to The Bank of
16 New York Mellon, as Trustee. Since the obligation was owed to the
17 Bank of New York Mellon, as Trustee, it appears that it is this
18 bank that holds the beneficial interest.

19 The parties must properly address who holds the note and has
20 the right to enforce the beneficial interest. The court issues the
21 Temporary Restraining Order to maintain the status quo pending the
22 hearing on the motion to dismiss. If the parties elect to extend
23 the term of the Temporary Restraining Order so as to allow the
24 hearing on the preliminary injunction to April 6, 2011, the court
25 will do so for the convenience of the parties.

26 Pursuant to Rule 65, Federal Rules of Civil Procedure, and
27 Rule 7065, Federal Rules of Bankruptcy Procedure, the court may
28 issue a temporary restraining order without notice if there is a

1 clear showing of immediate and irreparable harm. As stated above,
2 the court accepts the pro se Debtor/Plaintiff's statements in the
3 Motion for Temporary Restraining Order as being stated under
4 penalty of perjury. The court shall not grant the Debtor/Plaintiff
5 shall liberties in the future, and even the pro se plaintiff must
6 comply with basic requirements for pleadings and evidence.

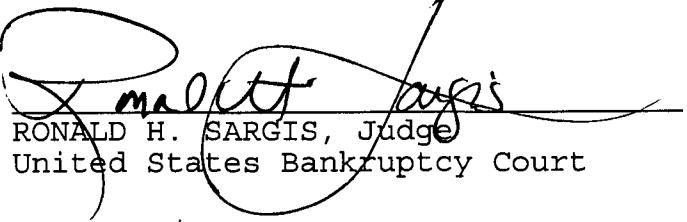
7 In balancing the hardships, there appears to be little
8 hardship for the Defendants as they have been litigating this case
9 since August 2010, and are operating under a stipulated time line.
10 Further, it appears that the automatic stay continues in full force
11 and effect in this case as to property of the estate, even though
12 the Debtor/Plaintiff has been discharged. The bankruptcy case has
13 not been closed and the property has not been abandoned by the
14 Chapter 7 Trustee. 11 U.S.C. § 362(c)(2). If the automatic stay
15 does not apply, then there is potential significant harm to the
16 Debtor/Plaintiff by clouding title to the property through a
17 purported valid non-judicial foreclosure sale or a potential third-
18 party purchasing the property at the sale. The potential loss of
19 his interest in the real property is potential irreparable harm
20 sufficient for the issuance of this preliminary injunction.

21 At this juncture and given that the parties are already in the
22 process of addressing the issues in the Motion to Dismiss of
23 whether there are even valid claims pled, the court finds that no
24 bond is required pending the hearing on the preliminary injunction.
25 In granting this Temporary Restraining Order, the Debtor/Plaintiff
26 should not be misled into thinking that the court has determined
27 that the various claims and assertions attacking the home mortgage
28 market in the 2000's, Robo-Signing, and post-Pineda loan

1 transactions by financial institutions are meritorious with respect
2 to the obligations owed by the Debtor/Plaintiff on the Note that is
3 secured by the Deed of Trust. Debtor/Plaintiff shall have to carry
4 his burden for any such claims at the hearing on the motion for
5 preliminary injunction, as well as the facts at his for his
6 specific loan, payments made by him on his specific loan, the
7 balance due on his loan, and why the holder of the note, whomever
8 it is, should not be allowed to foreclose based on the borrower's
9 (Pineda's) failure to make payments for the monies borrowed.

10 The court shall issue a Temporary Restraining Order and set
11 the hearing on the Preliminary Injunction for 10:30 a.m. on
12 **March 23, 2011**, at the United States Bankruptcy Court, 1200 I
13 Street, Modesto, California.

14 Dated: March **15**, 2011

15 
RONALD H. SARGIS, Judge
16 United States Bankruptcy Court

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This document does not constitute a certificate of service. The parties listed below will be served a separate copy of the attached document(s).

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